

FILE COPY

United States Court of Appeals, U. S. C.

RECEIVED

APR 20 1944

RECEIVED
APR 20 1944
U. S. COURT OF APPEALS
FOR THE SECOND CIRCUIT

Case No. 10002-44

**Arthur M. Schlesinger and Son, Bowdoin Co., Inc.,
Petitioners.**

~~Opponents~~

Atlantic Steel Casting Company,

Respondent.

**ANSWER AND POSITION TO PETITION
FOR CERTIORARI**

**HENRY N. LONGLEY,
Proctor for Respondent,
99 John Street,
New York 7, N. Y.**

**John W. R. [unclear],
of Counsel.**

INDEX.

	PAGE
Statement	1
Outline of Argument.....	1
POINT I—The District Court, sitting in Admiralty, had jurisdiction of the cause, both <i>in rem</i> and <i>in personam</i>	2
POINT II—By enactment of the U. S. Arbitration Act (9 U. S. C., Sec. 1-15), Congress neither divested the District Courts of their admiralty jurisdiction, nor gave parties to a maritime contract the power to withdraw their controversies from that jurisdiction by incorporating in their contract a clause providing for arbitration.....	3
Conclusion—The petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit should be denied.....	6

TABLE OF AUTHORITIES.

Table of Cases Cited.

<i>Atkins v. The Disintegrating Co.</i> , 18 Wall. 272,.....	3
<i>Birdsall v. Germain Co.</i> , 227 Fed. 953,.....	3
<i>Crowell v. Benson</i> , 285 U. S. 22, 49,.....	3
<i>Indiana Transportation Co., Ex parte</i> , 244 U. S. 456, 457	2
<i>Insurance Co. v. Morse</i> , 20 Wall. 445, 451,.....	6
<i>Marine Transit Co. v. Dreyfus</i> , 284 U. S. 263, 275,.....	5
<i>Merrimac, The</i> , 242 Fed. 572, 574,.....	2
<i>Monahan v. S. S. Howick Hall</i> , 10 F. (2d) 162,.....	6
<i>Murray's Lessee, et al. v. Hoboken Land and Improvement Co.</i> , 18 How. 272, 284,.....	3

	PAGE
<i>Quarrington Court, The</i> , 102 F. (2d) 916, cert. denied, 307 U. S. 645.....	5
<i>Red Cross Line v. Atlantic Fruit Co.</i> , 264 U. S. 109, 120	6
<i>Resolute, The</i> , 168 U. S. 437, 439.....	2
<i>Saginaw Lumber & Export Co. v. Bronx Barge Corp.</i> , 11 F. (2d) 982, 983.....	3
<i>Tatsuura K. K. K. v. Prescott</i> , 4 F. (2d) 670.....	6

Other Authorities Cited.

Arbitration Act (9 U. S. C., Sec. 1-15).....	3
Arbitration Act (9 U. S. C., Sec. 3).....	3, 5
Arbitration Act (9 U. S. C., Sec. 8).....	4, 5, 6
Constitution of the United States, Article III, Sec. 2.....	2
Judicial Code, Sec. 24, clause 3 (28 U. S. C., Sec. 41).....	2
Supreme Court Admiralty Rule 2.....	3
Supreme Court Admiralty Rule 10.....	2

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 649.

Barge "ANACONDA" and SMITH-ROWLAND CO., INC.,

Petitioners,

—against—

AMERICAN SUGAR REFINING COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

For the purposes of this application, respondent is satisfied with petitioners' statement of the case.

Outline of Argument.

Respondent submits: (1) That the District Court, sitting in admiralty, had jurisdiction of the cause both *in rem* and *in personam*; (2) that in enacting the U. S. Arbitration Act, Congress neither divested the District Courts of their admiralty jurisdiction, nor gave parties to a maritime contract the power to withdraw their controversies from that jurisdiction by incorporation of a clause requiring arbitration; and (3) that therefore, the petition should be denied.

POINT I.

The District Court, sitting in admiralty, had jurisdiction of the cause, both *in rem* and *in personam*.

The United States Constitution, Article III, Section 2, provides:

"The judicial Power shall extend * * * to all Cases of admiralty and maritime jurisdiction; * * *."

The Judicial Code, Section 24, clause 3 (U. S. Code, Title 28, Sec. 41), provides:

"The district courts shall have original jurisdiction as follows:

(3) *Admiralty causes, seizures, and prizes.* Third. Of all civil causes of admiralty and maritime jurisdiction, * * *."

The libel alleges (R. 3-5) loss of and damage to cargo carried on a voyage from Havana, Cuba to Port Everglades, Florida, a cause of action clearly cognizable in admiralty.

The admiralty jurisdiction of the District Court *in rem* was acquired by seizure of the barge (R. 22).

The Resolute, 168 U. S. 437, 439;

Ex parte Indiana Transportation Co., 244 U. S. 456, 457;

The Merrimac, 242 Fed. 572, 574 (S. D. Fla.);
Supreme Court Admiralty Rule 10.

As Smith-Rowland Company, Inc., was not within the Southern District of Florida (R. 11), jurisdiction *in personam* was acquired by process of foreign attachment (R. 24).

Atkins v. The Disintegrating Co., 18 Wall. 272; *Birdsalt v. Germain Co.*, 227 Fed. 953 (S. D. N. Y.); *Seminole Lumber & Export Co. v. Bronx Barge Corp.*, 11 F. (2d) 982, 983 (S. D. Fla.); *Supreme Court Admiralty Rule 2.*

POINT II.

By enactment of the U. S. Arbitration Act (9 U. S. C., Sec. 1-15), Congress neither divested the District Courts of their admiralty jurisdiction, nor gave parties to a maritime contract the power to withdraw their controversies from that jurisdiction by incorporating in their contract a clause providing for arbitration.

In *Murray's Lessee, et al. v. Hoboken Land and Improvement Co.*, 18 How. 272, this Court said (p. 284):

"To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

These words were quoted with approval by Mr. Chief Justice Hughes in *Crowell v. Benson*, 285 U. S. 22, at p. 49.

The Arbitration Act itself contains internal evidence of Congressional intent to conform to the doctrine embodied in the quotation; for in Section 3 it provides:

"If any suit or proceeding be brought in any of the

courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. Feb. 12, 1925, c. 213, §3, 43 Stat. 883."

Section 8 of the Act provides:

"If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings; and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award. Feb. 12, 1925, c. 213, §8, 43 Stat. 884."

In both sections there is implicit a recognition of the inability of Congress to divest the Federal Courts of the admiralty jurisdiction vested in them by the Constitution.

The Arbitration Act did not create for parties to a maritime contract containing an arbitration clause, a right to file suit in admiralty and to attach a vessel in accordance with usual admiralty practice; that right existed under the Constitution, the Judicial Code and ancient admiralty practice. The only effect of the Arbitration Act on the rights of parties to such a contract is that after a libel has been filed on the contract, the party sued may, at his election, petition for arbitration

and secure a stay of the proceedings until the conclusion of arbitration.

Sections 3 and 8 of the Act make it clear that the filing of suit by a party to a contract containing an arbitration clause is contemplated; and the right of a libellant to obtain security for his claim by attachment of a vessel owned by a respondent is particularly mentioned.

Clause 15 of the charter-party (R. 36) in the present case provides for arbitration of all disputes arising out of the charter-party under the provisions of the U. S. Arbitration Act "except that the provisions of Section 8 thereof shall not apply to any arbitration hereunder".

We have said that the right to file suit in admiralty *in rem* and *in personam* and to attach the property of a respondent, existed long before the passage of that Act. The purpose of Section 8 is not to create a right of attachment, but to preserve the right of a libellant to seek arbitration in an appropriate case after he has filed suit and seized a respondent's property according to the usual course of admiralty proceedings.

In *Marine Transit Co. v. Dreyfus*, 284 U. S. 263, this Court considered the Arbitration Act and said (at p. 275):

"The intent of §8 is to provide for the enforcement of the agreement for arbitration, without depriving the aggrieved party of his right, under the admiralty practice, to proceed against 'the vessel or other property' belonging to the other party to the agreement."

Were it not for Section 8, an aggrieved party would be obliged to forego his right of attachment under usual admiralty procedure if he would preserve his right to arbitration.

The Quarrington Court, 102 F. (2d) 916 (C. C. A. 2); certiorari denied 307 U. S. 645.

The only effect of the charter party provision relating to Section 8 of the Act, is that by filing the libel, the libellant forfeited its right to seek arbitration.

It has long been held that an executory agreement seeking to oust a court of jurisdiction is invalid and unenforceable.

Red Cross Line v. Atlantic Fruit Co., 264 U. S. 409 at p. 120 et seq.;

Insurance Co. v. Morse, 20 Wallace 445 at p. 451 et seq.;

Tatsuimā K. K. v. Prescott, 4 F. (2d) 670 (C. C. A. 9);

Monahan v. S. S. Howick Hall, 10 F. (2d) 162 (E. D. of La.).

If any provision in this charter-party could be construed as a prohibition of suit by libellant against respondent, it would be entirely void. The only result of a proper arbitration clause is that, under certain circumstances, suit may be stayed until arbitration is concluded.

CONCLUSION.

The petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

HENRY N. LONGLEY,

Proctor for Respondent.

99 John Street,
New York 7, N. Y.

JOHN W. R. ZISGEN,
Of Counsel,